

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LORA JEAN MARKER
Claimant

VS.

DILLON COMPANIES INC.
Self-Insured Respondent

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Docket No. 1,010,173

ORDER

Respondent requests review of the July 22, 2004 preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is an appeal from the second preliminary hearing that has been held on this claim. At the first preliminary hearing on May 25, 2004, the claimant requested additional medical treatment for her right shoulder and neck. After off the record discussions, the Administrative Law Judge (ALJ) noted on the record that the issue of treatment for the neck would be reserved until receipt of the deposition of Dr. Mary Ann Hoffman. Additional treatment for claimant's right shoulder was ordered and the ALJ concluded the parties would come back at a later time to address the issue of medical treatment for the neck.

At the second preliminary hearing held on July 22, 2004, claimant requested medical treatment for her neck as well as medical treatment for stomach complaints the claimant attributed to the prescribed medication she was taking for treatment of her right shoulder. Claimant argued she had complained of neck pain to all the physicians that had provided treatment but the primary focus of treatment was for her right shoulder complaints. Respondent argued the contemporaneous medical records do not mention any neck complaints for the approximate year claimant had received treatment for her shoulder. The (ALJ) ordered respondent to pay for medical treatment for claimant's neck with Dr. Hoffmann and treatment for the stomach problems with Dr. Matthew E. Bohm.

The respondent requests review of whether claimant suffered an injury to her cervical spine arising out of and in the course of employment with the respondent.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a meat cutter for respondent. Her job duties required that she unload boxes of meat delivered to the store where she worked. Claimant also cut and wrapped the meat for sale in the store. As she performed her job duties claimant began to experience pain in her shoulder and neck in November 2002.

Claimant initially received authorized medical treatment from Dr. Donald T. Mead who diagnosed right shoulder strain and provided conservative care which included physical therapy. On December 17, 2002, Dr. Mead referred claimant to Dr. John Gilbert for additional medical treatment. Claimant received additional conservative treatment for her right shoulder and a Functional Capacity Evaluation was performed on February 5, 2003. On February 12, 2003, Dr. Gilbert released claimant to return to work and provided permanent restrictions against lifting over 10 pounds, no repetitive hand activities and no lifting above the shoulder level. Claimant's employment was terminated because respondent could not accommodate Dr. Gilbert's restrictions.

Claimant requested respondent allow her to seek a second opinion and/or additional medical treatment after she was released by Dr. Gilbert. Respondent sent claimant to Dr. Sergio Delgado. Although claimant thought she was being sent for an opinion regarding additional treatment, instead, the doctor provided an impairment rating. Dr. Delgado examined the claimant on May 8, 2003, and concluded claimant suffered a work-related right shoulder strain.

Respondent did not authorize any further medical treatment for claimant. Because respondent did not provide additional medical treatment, the claimant sought treatment with her personal physician, Dr. Bohm in May 2003. Dr. Bohm prescribed anti-inflammatory, pain and muscle relaxant medication. The doctor also recommended additional physical therapy but respondent refused to authorize such therapy. Claimant continued to take the medication prescribed by Dr. Bohm.

At her attorney's request, claimant was examined by Dr. Daniel D. Zimmerman on September 17, 2003. Dr. Zimmerman diagnosed claimant with right shoulder tendinopathy caused by her repetitive work activities and provided permanent restrictions as well as an impairment rating.

In approximately April 2004, claimant complained of stomach pain to Dr. Bohm and was prescribed Nexium for that condition. The doctor opined that claimant's gastritis was caused by the medications that she was taking for her shoulder injury.

The ALJ had ordered an independent medical examination of claimant to be performed by Dr. Hoffmann. In a report dated March 26, 2004, Dr. Hoffmann noted that claimant's primary complaint was right shoulder pain but that claimant also complained of muscle spasms in her neck as well as popping in her neck. Claimant told Dr. Hoffmann that her neck problems had been present since November 2002 and that she told the doctors but did not receive any treatment or diagnostic tests for her neck.

Dr. Hoffmann concluded claimant still experienced problems from her work-related injury and had received minimal treatment. The doctor recommended x-rays and an MRI of claimant's right shoulder and cervical spine. Finally, the doctor stated claimant had symptoms of a C-6 radiculopathy and expressed concern that claimant's arm pain, shoulder pain as well as shoulder weakness were due to the neck.

Claimant then requested the follow-up recommended by Dr. Hoffmann. After the preliminary hearing held July 22, 2004, the ALJ ordered respondent to provide medical treatment for claimant's neck and stomach complaints.

Respondent noted that throughout claimant's treatment and examination by various doctors from November 2002 through her visit with Dr. Zimmerman in September 2003, there is no mention in the doctor's medical reports that claimant complained of neck pain. Respondent further notes that Drs. Bohm and Zimmerman were selected by the claimant and their reports do not indicate claimant complained of neck pain. Consequently, respondent argues claimant's neck complaints are not causally related to her work.

Treatment clearly focused on claimant's shoulder problem. The claimant opined that the neck was not mentioned in the contemporaneous medical records of Dr. Gilbert because he was told to just treat the shoulder. And although Dr. Gilbert examined claimant's neck he told claimant that all her pain was from the shoulder. But claimant noted that as she received treatment she told all the doctors that she was also experiencing neck pain. And while receiving treatment claimant was asked to fill out pain diagrams upon which she depicted ongoing neck pain. Such pain diagrams were provided to various doctors on November 24, 2002, January 28, 2003, and May 8, 2003.¹ The dates on the pain diagrams correspond to the dates claimant was seen by Drs. Mead, Gilbert and Delgado.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of

¹ P.H. Trans., Cl. Ex. 1.

² K.S.A. 44-501(a) (Furse 2000).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

When released to work claimant continued to complain of pain and requested additional treatment. The respondent refused to provide additional medical treatment and, nonetheless, claimant sought additional treatment from her personal physician, Dr. Bohm.

The claimant testified she told all the doctors that she had neck pain as well as shoulder pain. The claimant's testimony is corroborated by the pain diagrams which clearly depicted pain in claimant's neck. It should be noted that the dates the pain diagrams were filled out corresponds with the time medical treatment was provided by Drs. Mead, Gilbert and Delgado. And the report from Dr. Hoffmann, the court ordered independent medical examiner, noted claimant had received minimal treatment and further diagnostic testing for the cervical spine as well as the shoulder was recommended. The Board finds claimant has met her burden of proof to establish that her neck complaints are causally related to her repetitive work-related injuries and affirms the ALJ's Order For Medical Treatment.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated July 22, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2004.

BOARD MEMBER

c: Frederick J. Patton II, Attorney for Claimant
Scott J. Mann, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-508(g) (Furse 2000).